UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

LONGS DRUG STORES CALIFORNIA, INC.

and **Case 32-CA-21550**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 439, AFL-CIO

LONGS DRUG STORES CALIFORNIA, INC.
Employer

and **Case 32-RC-5259**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 439, AFL-CIO
Petitioner

Virginia L. Jordan, Esq., of Oakland, California,
appearing on behalf of the General Counsel

David A. Rosenfeld, Esq. and Caren P. Sencer, Esq.,
for **Weinberg, Roger & Rosenfeld**, of Oakland, California,
appearing on behalf of the Union

David Faustman, Esq., for **Grotta, Glassman & Hoffman, P.C.**, of San Francisco, California,
appearing on behalf of the Respondent

DECISION

BURTON LITVACK: ADMINISTRATIVE LAW JUDGE

Statement of the Case

On May 24, 2004,[1] International Brotherhood of Teamsters, Local 439, AFL-CIO, herein called the Union, filed a petition for a representation election in Case 32-CA-5259. Pursuant to a stipulated election agreement, agreed upon by the Union and Longs Drug Stores California, Inc., herein called Respondent, and approved by the Regional Director of Region 32 of the National Labor Relations Board, herein called the Board, on June 10, 2004, an election by

[1] Unless otherwise noted, all events herein occurred during 2004.

secret ballot was conducted on July 7,[2] and, on July 14, the Union filed timely objections to the conduct of the election. Thereafter, on August 2, 2004, the Regional Director issued a report and recommendations on objections, finding and concluding that certain of the Union's objections to the election raised material issues of fact and law, which should be resolved at a hearing. A week later, on August 9, 2004, the Union filed the unfair labor practice charge in Case 32-CA-21550. After an investigation, on October 22, 2004, the Regional Director of Region 32 issued a complaint, alleging that Longs Drug Stores California, Inc. had engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act, herein called the Act. Subsequently, on October 26, 2004, inasmuch as one of the Union's objections and the allegation of the complaint constituted "a single, overall controversy," the Regional Director issued an order consolidating the above-captioned matters for hearing. Respondent timely filed an answer to the complaint, essentially denying the commission of the alleged unfair labor practices. As scheduled, the merits of the complaint allegations and the Union's objections[3] came to trial before the above-named administrative law judge on January 10, 2005 in Oakland, California. At the said trial,[4] all parties were afforded the opportunity to examine and to cross-examine witnesses, to offer into the record all relevant documentary evidence, to argue their respective legal positions, and to file post-hearing briefs. All parties filed the latter documents, which have been carefully scrutinized and considered. Accordingly, based upon the entire record herein, including the post-hearing briefs and my resolution of the credibility of the witnesses, I make the following:

FINDINGS OF FACT

1. Jurisdiction

At all times material herein, Respondent, a State of Maryland corporation, with offices and places of business throughout the State of California and the Western United States, including its warehouse and distribution facilities in Lathrop, California, has been engaged in retail pharmacy and general retail sales. During the 12-month period preceding the issuance of the complaint, in the normal course and conduct of its business operations, Respondent derived gross revenues in excess of $500,000 and purchased and received in California goods and products, valued in excess of $50,000, directly from suppliers located outside the State of California. Respondent admits that it is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act.

II. Labor Organization

Respondent admits that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

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[2] The tally of ballots showed that, of 285 valid votes counted,107 votes were cast in favor of representation by the Union, and 175 votes were cast against the participating labor organization.

[3] On December 27, 2004, the Regional Director issued a document, entitled "Clarification Regarding Objections Noticed for Hearing," in which he set forth the issues for each of the Union's objections set for trial.

[4] During the trial, counsel for the General Counsel was granted permission to amend paragraph 5 of the complaint, which essentially conformed the allegations to the evidence, and counsel for the Union withdrew three of the Union's objections to the election.

III. Unfair Labor Practice Issues

The General Counsel contends that Respondent engaged in acts and conduct, violative of Section 8(a)(1) of the Act, by, at all times material herein, maintaining facially overbroad confidentiality provisions, which impinge upon its employees' Section 7 rights, in its employee handbooks, which were distributed to its employees. Respondent denied that said confidentiality provisions were facially unlawful.

IV. The Alleged Unfair Labor Practices

The record establishes that Respondent is a publicly-traded corporation, which owns and operates 450 retail drug stores in six western states, including California, and that it maintains three warehouse and distribution centers, including the distribution facility, at issue herein, located in Lathrop, California, from which goods and products are shipped to approximately 300 of its retail outlets. The Lathrop distribution facility consists of two buildings, an open 470,000 sq. foot building and a smaller building, located two miles away, in which seasonal items are stored. At all times material herein, approximately 350 employees worked in the larger building, and 10 to 12 employees worked in the smaller building. The record further establishes, and Respondent admits, that, at all times material herein, it has maintained and distributed to its employees copies of its employee handbooks,[5] which set forth terms and conditions of employment applicable to employees at its retail stores and at its distribution centers[6] and which are given to each new employee during his or her employment orientation period.[7] The General Counsel alleges that the confidentiality provisions, found in Respondent's employee handbooks, are violative of Section 8(a)(1) of the Act. Thus, as set forth on pages 12 and 13 of General Counsel's Exhibit No 3, Respondent's "Mainland 2000" handbook, under the heading "Corrective Action/Employee Conduct," the following acts ". . . may result in disciplinary action, up to and including termination. . . . Unauthorized disclosure of confidential information regarding customers, employees, or the business of the company," and, as set forth on page 8 of General Counsel's Exhibit No. 4, Respondent's November 2003 "Employee Handbook, under the heading, "Professional Behavior," Respondent ". . . expect[s] compliance with the following behaviors . . . . Maintain confidentiality, including but not limited to, information regarding customers, employees, and the company." With regard to the confidentiality rule, set forth in the

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[5] There are, apparently, two employee handbooks, General Counsel's Exhibits Nos. 3 and 4, with the latter published with the intent to replace all other handbooks published prior to November 2003. However, the parties stipulated that, during the critical period prior to the election, May 24 through July 7, 2004, both handbooks remained in effect for, and were distributed to, bargaining unit employees at the Lathrop distribution facility, with General Counsel's Exhibit No. 4 having been distributed to no more than five employees.

[6] According to Larry Gilbert, Respondent's human resources manager at its Lathrop distribution, while most of the terms and conditions of employment, set forth in the handbooks, applied to employees at the retail stores and at the distribution centers, some applied only to employees at the retail stores and some applied only to the employees at the distribution centers.

[7] According to Gilbert, the employee handbooks were included in each new employee's "new hire orientation packet." He added that the orientation process is a "laborious" one, consuming three or four hours, with explanation of the handbook provisions being one aspect of it. "Employees are given the handbook and what we retain is one sheet of paper that says I have received the employee handbook. We don't go through [it] with them." However, ". . . they were . . . encouraged . . . to read it in their time at home . . . ."

November 2003 revised employee handbook, on page 11 of said handbook, employees are admonished that they are "expected to adhere to the policies and practices that protect . . . employee confidential information," thereby complying with "federal and state privacy laws," and that the company trusts them not to disclose "such information to unauthorized persons, or organizations, or using it for personal gain."

While denying being aware that a confidentiality provision existed in Respondent's employee handbooks ("Honestly . . . . I wasn't aware that it was even in there"), Larry Gilbert testified that, in his capacity as Respondent's human resources manager, he was responsible for enforcing the work rules contained in the handbooks and that the purpose of the work rules was to make employees aware of prohibited conduct. He further testified that he was aware employees sometimes violated said provisions; that he would investigate on such occasions and take corrective action, up to and including discharge, if necessary; and that he knew employees were adhering to a rule when no violations of said provision were reported.[8] Specifically regarding the confidentiality provisions, while the record establishes that employees openly discussed wages during the critical period prior to the election, a chart, listing job classifications and applicable wage rates is posted in the employees' break area in both buildings, and Respondent shares labor cost information with competitors for surveys and while Gilbert was not aware of any violations of said provisions, he testified that individual employees' wage rates constitute confidential information, which he would never divulge, and that he maintained, in the personnel office, much material, including social security numbers, home addresses, workers compensation claims, time off records, and employee work-related complaints, which Respondent considers confidential.

The Board's touchstone for determining the legality of work rules, such as Respondent's confidentiality provisions, is found in Lafayette Park Hotel, 326 NLRB 824, 825 (1998)-- "In determining whether the maintenance of rules . . . violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." Recently, in Lutheran Heritage Village—Lavonia, 343 NLRB No. 75 (2004), the Board elaborated, stating that it must give alleged unlawful work rules "reasonable" readings and that, an inquiry into the legality of a work rule ". . . begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7 of the Act." If not, concluding that a provision violates Section 8(a)(1) of the Act ". . . is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; and (3) the rule has been applied to restrict the exercise of Section 7 rights." With regard to Respondent's confidentiality rule, I note, at the outset, that, in most circumstances, the concept of employees' communications with their fellow employees and with third parties, such as union representatives, regarding their terms and conditions of employment is a right clearly privileged by Section 7 of the Act. KinderCare Learning Centers, 299 NLRB 1171, 1171-1172 (1990).[9] Herein, noting that Respondent's confidentiality provision prohibits disclosure of confidential information, pertaining to employees,

[8] Bernie Tapia, a lead person for Respondent in its inventory control department, testified that employees were expected to abide by the warehouse rules and faced discipline for violating them.

[9] This statutory right is not an unfettered one. Thus, for example, employees' communications with others may not be so disloyal as to constitute "a disparagement or vilification of the employer's product or reputation." Sahara Dotsun, 278 NLRB 1044, 1046 (1986).

counsel for the General Counsel argues that said rules ". . . can by reasonably understood by employees as restricting their right to discuss with each other and with outsiders their terms and conditions of employment and, therefore, are unlawful on that basis." In several recent decisions, including Iris U.S.A., Inc., 336 NLRB 1013 (2001), University Medical Center, 335 NLRB 1318 (2001), and Flamingo Hotel-Laughlin, 330 NLRB 287 (1999), the Board had occasion to consider the language of confidentiality provisions, which were similar to those of Respondent. Thus, in Iris U.S.A., Inc., the respondent's confidentiality provision instructed employees that "all of the information, whether about IRIS . . . or employees is strictly confidential;" in University Medical Center, the respondent's rule prohibited "release or disclosure of confidential information concerning patients or employees;" and, in Flamingo Hotel-Laughlin, the respondent's rule prohibited employees from revealing confidential information about "fellow employees." As explained by former Chairman Hurtgen concurring in IRIS U.S.A., Inc., supra at 1014, and by the Board in University Medical Center, supra, at 1322, the language of such a rule ". . . is unlawfully broad because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment. . . which they might reasonably perceive as being within the scope of the broadly-stated category of 'confidential information` about employees" with other employees or with union representatives. From the foregoing, what is manifestly certain is that the Board's concern is with the utter ambiguity of such confidentiality provisions and the stifling effect of their incertitude upon employees' Section 7 activities and that, in order to overcome a presumption of invalidity, an employer must make it clear to employees that the thrust of an inexplicitly-worded confidentiality rule is not to prohibit discussion of their terms and conditions of employment. See Vanguard Tours, 300 NLRB 250, 264 (1990).

I agree with counsel for the General Counsel that Respondent's provisions patently demonstrate the vice of overbroad confidentiality rules. Thus, while Respondent's confidentiality provisions do not expressly prohibit employees from discussing their terms and conditions of employment, neither provision defines the ambiguous term "confidential information," leaving said language susceptible of interpretation that such includes information pertaining to the employees' terms and conditions of employment. Moreover, as noted by former Chairman Hurtgen, the nondisclosure prohibition seemingly extends to anyone, including fellow employees and third parties, including union representatives. Finally, the language on page 11 of General Counsel's Exhibit No. 4, which suggests that employees, who disclose confidential information, do so in violation of federal and state privacy laws, enforces the seriousness, which Respondent attaches to the nondisclosure of undefined confidential information, and might well inhibit employees in the exercise of their Section 7 right to discuss their terms and conditions of employment with each other and union representatives. While, in defense, counsel for Respondent points out that employees openly discussed wages and working conditions during the pre-election period without being disciplined and that job classifications and accompanying wage rates are posted in the facility, such lack of enforcement may only demonstrate Respondent's fear of interfering with the laboratory conditions prior to the representation election, and there is no evidence that any employees disclosed information about their working conditions to the Union's representatives. In the latter regard, as Larry Gilbert[10] pointed out, inasmuch as no violations of the confidentiality provisions were ever reported to him, one may presume that each was effective in curbing disclosure of employees'

[10] I believe Gilbert may well have dissembled in asserting he was unaware of the existence of the confidentiality provisions of the employee handbooks. In this regard, he was responsible for enforcing the work rules and for imposing discipline for violations. Moreover, he conducted orientation sessions for new employees and was cognizant of what types of employee information was considered confidential by Respondent.

terms and conditions of employment to outside entities. Based upon the foregoing, I agree with the General Counsel and counsel for the Union[11] and find that Respondent's confidentiality rules are violative of Section 8(a)(1) of the Act. IRIS U.S.A., Inc., supra; University Medical Center, supra.

The Union's Objections to the Election

Two of the Union's objections to conduct, by Respondent, which allegedly affected the results of the July 7, 2004 representation election, remain at issue. Initially, I consider the objection, which alleges "the Employer maintained unlawful rules," and note that the Regional Director, in his December 27 "clarification" document, stated that the rules, which he set for hearing, are those alleged as violating Section 8(a)(1) of the Act in the instant complaint-- Respondent's confidentiality rules. I have found above that, in fact, Respondent published and maintained confidentiality provisions in its employee handbooks, which were distributed to employees during the critical period preceding the representation election; that said rules were facially overbroad, susceptible of being interpreted as prohibiting employees from disclosing and discussing their terms and conditions of employment; and that, therefore, as did the respondent in IRIS U.S.A., Inc., supra, Respondent engaged in serious unfair labor practices in violation of Section 8(a)(1) of the Act. In this regard, the usual test for the validity of an objection is whether the asserted conduct ". . . had a reasonable tendency to effect the outcome of the election" (Delta Brands, Inc., 344 NLRB No. 10 (2005)), and "it is well settled that conduct in violation of Section 8(a)(1) of the Act that occurs during the critical period prior to an election is '*a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election.'" IRIS U.S. A., Inc., supra; Dal-Tex Optical Co., 137 NLRB 1782, 1786 (1962).[12] Nevertheless, counsel for Respondent points to the Board's decision in Delta Brands, Inc. and asserts that said decision is "dispositive" of the issues presented by this objection. I disagree. Thus, in Delta Brands, Inc., a case involving objections to an election with no accompanying alleged unfair labor practices, the issue, before the Board, was whether an employer's mere maintenance of an alleged overbroad no-solicitation rule during the critical period before a representation election was sufficient to overturn the results of the election. The Board held that, assuming the rule was facially overbroad, absent a showing that any employee was affected by its existence, the rule was enforced during the critical period, or there was any mention of it during the critical period, ". . . the mere maintenance of [such a] rule will not be the basis for overturning an election where [the petitioning labor organization] was in a position to advise employees of their rights." Id. at slip. op. 2. Contrary to counsel, the lack of an accompanying unfair labor practice allegation in Delta Brands, Inc. is a critical distinction inasmuch as ". . . conduct which may interfere with the 'laboratory conditions' for an election is

[11] Counsel for the Union argue that Respondent's confidentiality provisions are also unlawful because they may prevent employees from disclosing information pertaining to the financial condition of the company to union agents. In this regard, counsel argues that such information, including plans for layoffs and plant or store closures, would aid the Union in its organizing efforts. Counsel further argues that, insofar as the rules may be construed as precluding disclosure of information pertaining to vendor and supply lists, shipping plans, and sale plans, which information would be necessary for possible peaceful boycotts, Respondent's confidentiality provisions are overbroad. Given my finding herein, I need not rule on counsels' theories and suggest that they may be best put before the Board for its consideration.

[12] The Board has traditionally recognized a limited exception to this rule-- where the conduct ". . . is so minimal or so isolated that 'it is virtually impossible to conclude that the misconduct could have affected the election results." IRIS U.S.A., Inc., supra, at 1013; Clark Equipment Co., 278 NLRB 498, 505 (1986).

considerably more restrictive than the test [for] conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." Dal-Tex Optical Co., supra. Moreover, Respondent's confidentiality rule applied to the entire bargaining unit and, as such was published in the employee handbooks, which were distributed to employees during orientation and which employees were expected to read, was widely disseminated to all employees. Finally, as in IRIS U.S.A., Inc., the ambiguity of Respondent's rule, accompanied by the language in the 2003 employee handbook, which warns that employees, who fail to adhere to the confidential information prohibition, act in contravention of federal and state law, may well have inhibited employees from exercising their Section 7 right to discuss their terms and conditions of employment with others, including union representatives. Accordingly, based upon the foregoing, while it is true there is no record evidence of enforcement of the rule during the critical period and while I understand the import of Delta Brands, Inc., I adhere to traditional Board law and find that the Union's objection, which involves the identical conduct as Respondent's serious unfair labor practice, is meritorious. IRIS U.S.A., Inc., supra.[13]

Turning to the Union's next objection, concerning alleged campaigning activities by certain lead personnel, acting as supervisors or agents of Respondent, directed at employees as they waited to vote in the election, the record establishes that Respondent employed approximately 300 workers at its Lathrop distribution facility at the time of the election, including 10 to 12 supervisors and15 individuals classified as lead employees; that the lead employees, who assist the supervisors and are responsible for crews of approximately six employees, are hourly employees; and that the lead employees, who have no authority to hire, fire, set wage rates, discipline, or grant time off, are authorized to give other employees work assignments, to reassign employees from one job to another, and to direct them in their work; and that the lead employees exercise some degree of discretion in assigning work to employees. With regard to the authority of lead persons to assign and direct the work of employees on their crews, Bernie Tapia testified that, while, on a daily basis, employees, who are on his work crew, know their job functions and what work they should be performing, when he selects an employee for a change of job assignment, he takes into account the employee's work skills and experience and the nature of the work. Tapia further testified that he is authorized to handle "minor" disciplinary problems, which he defined as those not requiring written disciplinary action, and employees know he is the person, whom they should approach, with any work problems. Finally, in these

[13] Counsel for the Union argue that, in addition to Respondent's confidentiality provisions, its "unlawful rules" objection also encompassed Respondent's rules, prohibiting solicitations, and that the latter work rules are likewise overbroad and, therefore, unlawful. Contrary to counsel, while the Union may well have included Respondent's solicitation rules in its "unlawful rules" objection, the Regional Director did not include them within the objections set for hearing in the instant matters; nor did the Regional Director allege Respondent's solicitation rules as unlawful in the instant complaint. In these circumstances, especially noting that the Regional Director specifically clarified the "particular matters," pertaining to the objections, which were to be set for trial before the above-named administrative law judge, I have no authorization to consider the merits of the Union's assertion that Respondent's solicitation prohibition also constitutes objectionable conduct. Moreover, assuming that I do posses such authority, I would not find merit to counsel's contention. Thus, while the solicitation rules, in both General Counsel's Exhibits 3 and 4, state, "If you observe solicitation on company property at any time, report it to your manager immediately" and while each may arguably be unlawful, there is no record evidence either that employees were aware of said rules, which are contained in multi-page documents, or that employees were ever disciplined for soliciting for the Union. In these circumstances, an objection, based solely on the presumed facial illegality of the solicitation provision, would not be meritorious. Delta Brands, Inc., supra.

regards, Manuel Lopez, who, at the time of the election, worked as an inventory control employee for Respondent, testified that Bernie Tapia was the lead person in his department; that Tapia held a meeting with the inventory control employees at the start of each work shift in order to give them their work assignments; and that "most of the employees" considered the leads to be their supervisors.

With regard to the merits of the allegation, John Henderson, who is employed by Cruz and Associates, a labor relations consulting company, and who worked for Respondent as a labor relations consultant during the pre-election campaign, testified that, during the election voting hours on July 7,[14] he, Larry Gilbert, other management representatives for Respondent, and other employees of Cruz and Associates, were stationed in a conference room of the main distribution facility building, waiting for the voting to conclude,[15] and that, sometime after 9:00 that morning, Mike Moore, the facility manager, received a "walkie-talkie" call[16] from a supervisor in the building. The sound was audible throughout the room, and "the call was that the Board agent had sent an employee looking for a supervisor to ask that there be some control exerted over the employees outside the polling area."[17] Upon the conclusion of the call, "we had a discussion . . . in the conference room and decided that we could ask some of the lead workers to go . . . and control the crowd that was waiting to vote because they were not supervisors . . . ." [18] Henderson added that four lead personnel, Bernie Tapia, Randy Delatta, Marvin Andrews, and Mario Bustamante, were selected to comply with the Board agent's request, and Moore telephoned the supervisor, to whom he had previously spoken, and told him ". . . to ask the four lead workers . . . to go back to the polling place and to try and control the crowd and make sure that people were orderly in line and, if they were done voting, to leave the area and go back to work." Henderson further testified that, upon conclusion of the morning voting period in the main facility, he spoke to lead persons Tapia and Andrews, and "they told me that they went back to the polling area. There were a large number of employees milling around. It was quite loud. They [told those who had yet to vote] to get in line. If they had voted, please go back to work and to keep the noise down . . . ." According to Henderson, the two lead workers also told him they were with the employees, who were waiting to vote, for no more than 15 to 20 minutes between 9:15 and 9:45am. As to what occurred that morning when the lead personnel[19] enforced management's instructions, Manuel Lopez testified that he was in the voting line, which stretched from an entrance to the voting area back into the work area of the distribution facility, for "roughly 20 minutes," that Tapia, Bustamante, and Delatta were standing near the line the entire time he was in the area, and that Delatta ". . . was telling [the employees] get in line, hurry up, go to work, don't be talking, comments like that. Also, according to Lopez, the three lead persons ". . . were all together and . . . not directly at anybody . . . telling each other they ain't going to win, the union is going to lose. . . . They made comments to each other

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[14] The election hours were 9:00am until 11:00am and 8:00pm until 10:00pm in the main distribution facility and 11:45am until 12:45pm in the smaller building.

[15] According to Henderson, "We had been told by the attorney handling the case not to be anywhere near the election."

[16] All facility managers were equipped with NEXTEL cellular telephones.

[17] Moving 12 foot-high stacks of boxes to create an enclosed 20 sq. ft. voting area with two entrances, Henderson testified, created the polling area. He added that the polling enclosure was not a private area. Thus, ". . . it was open to the back of the warehouse," and ". . . you could easily hear inside what was going on outside and visa versa."

[18] The lead employees were eligible voters, whose names were on the Excelsior list.

[19] According to lead person, Bernie Tapia, each of the four or five lead workers, who was in the voting area, wore a T-shirt, with "Vote No" across the front. John Henderson testified that Respondent placed the T-shirts in the employee break room on the day of the election.

about vote no . . . but never directly to [any] individual but made sure people heard."[20] Asked by me if he was describing a single incident, Lopez replied that the three leads made these comments "continually with different people as they were coming through." Bernie Tapia contradicted Lopez, stating that, upon being instructed by the production supervisor to walk over to the line of workers, who were waiting to vote, and make sure those, who voted, returned to work, he went to the voting area, and "I just made sure that everyone standing in line kept walking forward till they got to the point of voting. When they got out, I just watched as they walked away." Tapia stated he remained in the voting area "probably about an hour" until the completion of the voting period at 11:00am but denied directly telling any employee to vote no. Further, while admitting there were times the four or five lead personnel talked among themselves while in the voting area, he was certain that their talk was about work and not the election.

Having carefully considered the credibility of each, I credit Manuel Lopez' version of what occurred over that of Bernie Tapia. Thus, Lopez impressed me as testifying in a veracious manner and appeared to be significantly more candid than Tapia. Further, the latter failed to specifically deny the essence of Lopez' testimony-- that, while positioning themselves near the line of employees, who were waiting to vote, lead personnel, including him, in voices audible to the employees, made disparaging comments about the Union and suggested employees should vote "no." Finally, Tapia and John Henderson contradicted each other as to the amount of time the former spent near the line of employees, who were waiting to vote in the election, with Tapia saying he remained there until the close of the morning voting period at 11:00 and Henderson saying Tapia told him they left the voting area by 9:45. In these circumstances, I find that, on the morning of the election, acting pursuant to instructions from managers, lead personnel, including Bernie Tapia, Randy Delatta, and Mario Bustamante, stood near the line of employees, who were waiting to vote, and, while maintaining discipline, in voices audible to the said employees, continually disparaged the Union and urged employees to vote "no."

Counsel for the Union argue that Respondent's lead persons are supervisors within the meaning of Section 2(11) of the Act and, if not, were acting as its agents, within the meaning of Section 2(13) of the Act, when maintaining order on the voting line during the time of the election. Contrary to counsel for the Union and in agreement with counsel for Respondent, I do not believe the lead personnel are supervisors. Thus, while it is true that said individuals are authorized to assign work and, utilizing a degree of discretion, to change the work assignments of other employees and that "an individual is a supervisor under Section 2(11) of the Act if that person exercises any of the supervisory authority set forth therein with independent judgment," on a daily basis, Respondent's employees normally know their work assignments and the jobs they are to perform. Moreover, the fact that lead personnel select the employees, whose work assignments will be changed, appears to be demonstrative of nothing more than ". . . the knowledge expected of experienced persons regarding which employees can best perform particular tasks." Hexacomb Corporation, 313 NLRB 983, 984 (1994); Quadrex Environmental Co., 308 NLRB 101 at 101 (1992). However, I agree with counsel for the Union that the lead workers acted as Respondent's agents while they acted to maintain order on the line of employees waiting to vote in the representation election. In this regard, "the burden of proving an agency relationship is on the party asserting its existence." Tyson Fresh Meats, Inc., 343 NLRB N0. 129 at slip. op. 3 (2004). An alleged agent may have actual authority or apparent authority. The former ". . . refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. Said manifestation of authority may be either express or implied." Id; Communications Workers Local 9431 (Pacific Bell), 304

[20] Lopez stated that the lead persons' words were audible "all through the line."

NLRB 446 at n. 4 (1991). On the other hand, apparent authority exists when there has been some 'manifestation' by the employer to employees that creates a reasonable basis for the employees to believe that the employer has authorized the alleged agent to perform the acts in question." Teddi of California, 338 NLRB 1032, 1037 (2003). Further, with respect to the principal's liability for the actions of its agent, such responsibility is established ". . . if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent . . . it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted." Tyson Fresh Meats, supra; Bio-Medical Applications of Puerto Rico, Inc., 269 NLRB 827, 828 (1984).

Herein, the record evidence is that Respondent's lead personnel assign work, reassign work to employees, and resolve minor disciplinary problems and that Respondent specifically authorized four lead persons to maintain order and decorum on the line of employees, who were waiting to vote in the representation election. These factors convince me that Respondent gave its lead personnel actual authority to represent its interests in the voting area on the morning of the election and that, while there is no affirmative evidence that Respondent specifically authorized said individuals to utter the comments which are attributed to them, speaking about the Union fell within the range of their authority. This is so, for "'it is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.'" Tyson Fresh Meats, supra at 4, quoting Teamsters Local 886 (Lee Way Motor Freight), 229 NLRB 832 at n. 5 (1977). Moreover, under the concept of apparent authority, I think that Respondent created a perception that its lead personnel represented its interests when they conversed in the presence of the employees, who were waiting in line to vote. Thus, Respondent's lead personnel held daily meetings with employees in order to give to them their work assignments, resolved minor grievances, changed employees' work assignments, and were considered by employees to be supervisors. Moreover, the lead personnel were in the voting area maintaining order among the employees, who were in line to vote. In these circumstances, I believe that Respondent ". . . either intended employees to believe that the [lead persons] were acting for [Respondent] when they spoke to employees in the voting line or that [Respondent] should have realized that the employees waiting in line to vote would have perceived the [lead persons] as [Respondent's] agents." Tyson Fresh Meats, supra. Accordingly, I find that Respondent was responsible for the actions of its lead personnel, who were in the voting area during the morning election period at its distribution facility.[21]

Having determined that Respondent was responsible for the acts and conduct of its lead personnel, who were in the voting area, the question remains whether they engaged in objectionable conduct. In Michem, Inc., 170 NLRB 362 (1968), the Board promulgated a strict

[21] Counsel for Respondent contends that it acted at the behest of the Board agent when it sent its lead personnel to the voting area in order to maintain decorum on the voting line. In my view, while the Board agent was ultimately responsible for maintaining order on the voting line, when it acted in compliance with the Board agent's wishes and appointed its lead personnel to monitor the employees, who waited to vote, Respondent alone bore responsibility for their acts and conduct.

Also, contrary to counsel for Respondent, I believe that the lead persons herein were no less agents of Respondent than were the shop stewards, in Tyson Fresh Meats, supra, agents of the union. Thus, while there are obvious fact differences, Respondent admitted it gave a range of actual authority to the lead personnel to maintain order on the voting line. Moreover, by utilizing the lead workers, who assign work, change work assignments, and resolve minor employee problems, to maintain order on the voting line, Respondent clearly created the perception that the leads represented its interests in doing so.

rule, concluding that sustained conversations between supervisors or agents of one of the parties to a representation election and employees, who are waiting to cast ballots, constituted objectionable conduct. The Board held ". . . that the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations." Herein, Respondent's lead personnel, while standing together close to the voting line for as long as an hour, made disparaging comments about the Union and suggested that employees cast "no" votes. While, concededly, none of the leads directly engaged any employee in such conversation, as they spoke in loud enough voices to make certain their comments were audible to all in the voting line, their obstructive intent was patently obvious. Therefore, in my view, the vice, which the Milchem rule was intended to prevent, was blatantly flaunted by Respondent's lead personnel and the Union's objection clearly must be found meritorious. Tyson Fresh Meats, supra.

In the foregoing circumstances, having found each of the Union's existing objections to have merit, I conclude that Respondent's acts and conduct were sufficiently serious to have destroyed the laboratory conditions, which are required for the unfettered selection of a bargaining representative. Accordingly, I remand Case 32-RC-5259 to the Regional Director of Region 32 for the purpose of conducting a new election at such time as he deems circumstances permit the free choice of a bargaining representative.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By, at all times material herein, publishing and maintaining in effect confidentiality provisions in its personnel handbooks, which, by their terms, may be understood as prohibiting employees from discussing their wages and other terms and conditions of employment with fellow employees and third parties, such as union representatives, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I have found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(a)(1) of the Act. Therefore, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act, including the posting of a notice, delineating for its employees its acts of misconduct.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Continued

ORDER

The Respondent, Longs Drug Stores California, Inc. , its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Publishing and maintaining in effect confidentiality provisions in its personnel handbooks, which, by their terms, may be understood as prohibiting employees from discussing their wages and other terms and conditions of employment with other employees and third parties, including union representatives.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its distribution facility, in Lathrop, California, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 24, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on July 7, 2004 be set aside and the case be remanded to the Regional Director of Region 32 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

Dated: APRIL 13, 2005

_____
Burton Litvack
Administrative Law Judge

Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT publish or maintain in effect confidentiality provisions in our personnel handbooks which may be understood by our employees to prohibit them from discussing their wages and other terms and conditions of employment with their fellow employees or third parties, including union representatives.

WE WILL NOT, in any manner, interfere with, coerce, or restrain our employees in the exercise of their rights guaranteed to them by Section 7 of the National Labor Relations Act.

Longs Drug Stores California, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.